No. 91-5397

In The

Supreme Court of the United States

October Term, 1992

EMERY L. NEGONSOTT,

Petitioner,

v.

HAROLD SAMUELS, WARDEN, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF OF AMICI CURIAE DEVILS LAKE SIOUX TRIBE OF THE FORT TOTTEN INDIAN RESERVATION, NORTH DAKOTA and SAC & FOX TRIBE OF THE MISSISSIPPI IN IOWA OF THE MESQUAKIE SETTLEMENT, IOWA IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

This brief is submitted with the written consent of all parties to the case, lodged with Clerk. Amici are the only two tribes outside of the State of Kansas affected by statutes identical to 18 U.S.C. §3243, the statute at issue here. See, Act of May 31,

1946, 60 Stat. 229, conferring criminal jurisdiction on the State of North Dakota with respect to crimes committed by or against Indians on the Devils Lake Indian Reservation (also known as the Fort Totten Indian Reservation), and Act of June 30, 1948, 62 Stat. 1161, conferring criminal jurisdiction on the State of Iowa with respect to crimes committed by or against Indians on the Sac and Fox Indian Reservation (also known as the Mesquakie Settlement).

ARGUMENT

The State Of Kansas Has No Jurisdiction Under 18 U.S.C. §3243 To Prosecute Crimes Included In The Indian Major Crimes Act, 18 U.S.C. §1153.

The only issue presented in this appeal is whether 18 U.S.C. §3243 conferred criminal jurisdiction on the State of Kansas to prosecute Indians for offenses committed on an Indian reservation when the offense is subject to federal criminal

jurisdiction under the Indian Major Crimes Act, 18 U.S.C. §1153. Put another way, the issue is whether, after enactment of §3243, federal criminal jurisdiction under §1153 remains exclusive with respect to the crimes enumerated therein. The courts below, both finding §3243 to be "ambiguous" on this issue, J.A. at 12, 22, concluded that the State of Kansas and the federal government have concurrent jurisdiction over Indian offenses falling within the Indian Major Crimes Act. The identical 1948 Iowa Act has been construed to exclude state jurisdiction over such Indian offenses. Youngbear v. Brewer, 415 F.Supp. 807 (N.D. Iowa 1976), aff'd., 549 F.2d 74 (8th Cir. 1977).

Section 3243 was the first of several enactments conferring criminal jurisdiction on states over crimes committed in Indian country. The language and legislative

history of these various statutes places §3243 in a contextual framework that supports the Eighth Circuit's analysis in Youngbear.

Section 3243 and its progeny were each enacted to fill a criminal law enforcement void on Indian reservations. While the federal government had exclusive criminal jurisdiction over the major crimes enumerated in §1153 and over certain other crimes covered by 18 U.S.C. §1152 and other federal laws, tribal governments, as many do today, retained exclusive jurisdiction over numerous non-major crimes, not defined by the laws of the United States, where both the offender and the victim were Indians or where the offender was Indian and the victim was non-Indian. Unfortunately, some tribes did not have the institutions in place to exercise this jurisdiction, leaving petty crimes

unaddressed. It was this problem that motivated the enactment of §3243. H.Rep.No. 1999, 76th Cong. 3d Sess. 2-5 (April 22, 1940); S.Rep.No. 1523, 76th Cong. 3d Sess. 2-4 (April 25, 1940). Kansas Congressman W.P. Lambertson, sponsor of the measure that became §3243, 84 Cong Rec. 662, 76th Cong. 1st Sess. (1939), stressed this in his statement to the House Committee on Indian Affairs five days before the Committee reported the bill. "The Government here relinquishes to the State full jurisdiction over the Indians for small offenses." H.Rep.No. 1999, supra, at 2.[1]

The several subsequent similar statutes were motivated by the same concern. The

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[1] "It is the sponsors that we look to when the meaning of the statutory words is in doubt." Woodwork Manufacturers v. NCRB, 386 U.S. 612, 640 (1967); Schwegmann Bros. v. Calvert Distilleries Corp., 341 U.S. 384, 394-395 (1951).

1946 North Dakota Act, for example, was enacted because the "status of jurisdiction over these [Devils Lake Sioux] Indians is somewhat confused," and the Tribe did not have a tribal court to prosecute Indian offenders. S.Rep. No. 997, 79th Cong. 2d Sess. 2 (February 27, 1946); H.Rep.No. 2032, 79th Cong. 2d Sess. 2 (May 13, 1946).[2] There was clearly no confusion in 1946 regarding federal exclusive criminal jurisdiction to prosecute Indian and other offenders under either §1152 or §1153. The only confusion concerned crimes not subject to these sections. The purpose of the

[2] For some forty years, The Devils Lake Sioux Tribe has had a Court of Indian Offenses established and operated by the Secretary of the Interior under 25 C.F.R. Part 11. The Court exercises criminal jurisdiction over all Indian offenders who commit any of the 66 offenses enumerated in 25 C.F.R. §§11.38-11.98ME and additional offenses contained in the tribal code. State law enforcement and the exercise of State criminal jurisdiction on the Tribe's reservation has been rare and has not involved major crimes.

statute was to assure state law enforcement and criminal jurisdiction over crimes not already subject to exclusive federal jurisdiction and over which the Tribe was not prepared to exercise criminal jurisdiction.[3]

The 1948 Iowa Act which, like the 1946 North Dakota Act, is identical in language to the 1940 Kansas Act, most clearly demonstrates the purpose of Congress to retain exclusive federal jurisdiction over Indian offenders who commit a crime enumerated in §1153. Noting that conferring criminal jurisdiction on the State of Iowa would "establish no precedent" because "[s]imilar acts have been passed conferring jurisdiction on the State of Kansas and North Dakota", H.Rep.No. 2356, 80th Cong.

[3] Recently, the North Dakota Supreme Court reserved the question of whether the 1946 Act conferred jurisdiction on the State over major crimes. State v. Hook, 476 N.W.2d 565, 571 n. 6 (N.D. 1991).

2d Sess. 2 (June 15, 1948), the House Report most clearly articulates congressional intent.

> The need of this legislation arises from the fact that in certain instances, Indian tribes do not enforce the laws covering offenses committed by Indians; under the present law the State has no jurisdiction to enforce laws designed to protect the Indians from crimes perpetrated by or against Indians; and law and order should be established on the reservation when the tribal laws for the discipline of its members have broken down.
>
> The bill contains no mandatory provisions whereby the State is bound to enforce the criminal laws in all instances of crime, but is permissory in nature and will establish a uniformity of jurisdiction in the State of Iowa which may be used to enforce the law when deemed proper and necessary by State officials and when law enforcement by Indian courts is deemed unsatisfactory.

Id. at 1. The Justice Department and the Department of the Interior supported the legislation primarily because, in the absence of a tribal court, no court had jurisdiction over crimes, not defined by federal law, committed by Indians against

other Indians. Id. at 2-3. See also, S.Rep.No. 1490, 80th Cong. 2d Sess. 2-3 (June 4, 1948).[4]

Contemporaneous with consideration of the Iowa Act, H.R. 4725 was passed by the House, 94 Cong.Rec. 2854-2855, 80th Cong. 2d Sess. (March 15, 1948), and reported in the Senate. S.Rep.No. 1142, 80th Cong. 2d Sess. (April 20, 1948). The measure, reprinted at 94 Cong.Rec. 2855, conferred jurisdiction on each State "over offenses committed by or against Indians on Indian reservations or parts thereof" while preserving federal criminal jurisdiction

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[4] After enactment of the 1948 Iowa Act, the murder charge against Ellsworth Youngbear in 1974 appears to have been the first reported federal major crime committed by an Indian on the Sac and Fox Reservation. Since the Eighth Circuit's 1977 Youngbear decision, major crimes on the reservation have been virtually unknown. In addition, State law enforcement and the exercise of criminal jurisdiction with respect to minor crimes has also been rare.

over such offenses when defined by the laws of the United States. The substantive language of the measure is identical to the language of the Kansas, North Dakota and Iowa acts. Both the House and Senate Reports on the measure note that the 1940 Kansas Act and the 1946 North Dakota Act established the precedent for enactment of general legislation conferring criminal jurisdiction on the States. The House Report explains the legislative purpose.

> The need of this legislation arises from the fact that in certain instances, Indian tribes do not enforce the laws covering offenses committed by Indians; under the present law the States have no jurisdiction to enforce laws designed to protect the Indians from crimes perpetrated by or against Indians; and to establish law and order on Indian reservations when the need arises.
>
> This legislation will establish a uniformity of jurisdiction in all States which may be used to enforce the law when deemed proper and necessary by State officials and when law enforcement by Indian courts is deemed unsatisfactory....
>
> This bill contains no mandatory

> provisions whereby the States are bound to enforce the criminal laws in all instances of crime, but is permissory in nature and vests concurrent jurisdiction[5] in the States insofar as State laws are concerned....
>
> It is expected under the proposed legislation that local [State] policing will only step in when both Indian and Federal police protection has broken down.

H.Rep.No. 1506, 80th Cong. 2d Sess. 1-3 (March 4, 1948). After the House passed the bill on March 15, the Senate Committee on Interior and Insular Affairs reported the bill with a technical amendment "to make it clear that the provisions of this bill, if enacted, will confer jurisdiction on State courts over minor offenses committed by Indians." S.Rep.No. 1142, supra, at 1. The Truman administration opposed the bill on

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[5] This reference to "concurrent jurisdiction" was necessitated by §3 of the bill which, in part, provided: "Nothing contained in this act shall deprive any Indian governing body of jurisdiction over offenses defined by the laws of such body...." 94 Cong.Rec. 2855.

the ground that a transfer of jurisdiction over Indian reservations having adequate tribal court and law enforcement systems was unjustified. Id. at 3; H.Rep.No. 1506, supra, at 2-3.

Two days after the 1948 Iowa Act became law, a similar measure pertaining to New York became law. 25 U.S.C. §232. The measure was a response to a New York State legislative resolution memorializing Congress to confer criminal jurisdiction on the State of New York over offenses committed by Indians on Indian reservations "excepting only those matters wherein jurisdiction has been or hereafter shall be expressly assumed by the Federal Government." H.Rep.No. 2355, 80th Cong. 2d Sess. 2 (June 15, 1948); S.Rep.No. 1489, 80th Cong. 2d Sess. 2 (June 4, 1948). The United States Attorney for the western district of New York also urged enactment

of the measure. His concern was focussed on "petty offenses [that] are committed [by Indians] on the reservation and nothing much is being done about it." H.Rep.No. 2355 at 3; S.Rep.No. 1489 at 3. These "petty offenses" were described as disorderly conduct, driving while intoxicated, and fighting while intoxicated. H.Rep.No. 2355 at 3; S.Rep.No. 1489 at 2-3. The Department of the Interior endorsed the measure as well, noting that "[n]one of the Indian groups in the State have courts which now handle crimes not subject to Federal jurisdiction....[T]hey would be benefited by the imposition of State criminal laws which would not conflict with Federal jurisdiction." H.Rep.No. 2355 at 3-4; S.Rep.No. 1489 at 3. The Department recommended an amendment to incorporate the Kansas Act proviso concerning courts of the United States not

being deprived of jurisdiction over offenses defined by federal law. H.Rep.No. 2355 at 4; S.Rep. No. 1489 at 4.

Again noting the precedent for the legislation established by the Kansas and North Dakota Acts, the House Report describes the purpose of the New York bill.

> The need of this legislation arises from the fact that in certain instances, Indian tribes do not enforce the laws covering offenses committed by Indians; under the present law the State has no jurisdiction to enforce laws designed to protect the Indians from crimes perpetrated by or against Indians; and law and order should be established on the reservations when tribal laws for the discipline of its members have broken down.
>
> This bill contains no mandatory provisions whereby the State is bound to enforce the criminal laws in all instances of crime, but is permissory in nature and will establish a uniformity of jurisdiction in the State of New York which may be used to enforce the law when deemed proper and necessary by State officials and when law enforcement by Indian courts is deemed unsatisfactory.

Id. at 1-2. Section 232 was enacted without the proviso expressly preserving federal

jurisdiction. The Second Circuit has held that, nonetheless, the United States retains concurrent criminal jurisdiction over reservations in New York. United States v. Cook, 922 F.2d 1026, 1032-1033 (2nd Cir. 1991), cert.den., 111 S.Ct. 2235 (1991).[6]

The Congress did not again consider conferring State criminal jurisdiction over offenses committed by or against Indians in Indian country until 1953. That year P.L. 83-280 (18 U.S.C. §1162) was enacted. As originally introduced, the bill, utilizing language indistinguishable from the Kansas, North Dakota and Iowa acts, conferred

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[6] The Act of October 5, 1949, 63 Stat. 705, conferring criminal jurisdiction on the State of California over offenses committed on the Agua Caliente Indian Reservation had a legislative history similar to that of the Kansas, North Dakota, Iowa and New York laws. See, H.Rep.No. 956, 81st Cong. 1st Sess. (1949) and S.Rep.No. 669, 81st Cong. 1st Sess. (1949).

criminal jurisdiction only on the State of California and preserved federal jurisdiction over offenses defined by federal law. 99 Cong.Rec. 9962, 83d Cong. 1st Sess. (July 27, 1953). Prior to enactment, however, the bill was amended to confer Indian country criminal jurisdiction on five states and establish a procedure for every other state to assume such jurisdiction. The amendment also deleted any reference to continued federal criminal jurisdiction and provided that §1152, the General Crimes Act, and §1153, the Indian Major Crimes Act, "shall not be applicable within the areas of Indian country [in the five states] listed in subsection (a) of this section." Id. at 9963. See, 18 U.S.C. §1162(c).[7] Thus, for the first time since

[7] The Act of November 25, 1970, 84 Stat. 1358, amended 18 U.S.C. §1162(c) to add at the end thereof "as areas over which the several States have exclusive jurisdiction." This language was added to clarify the subsection, not to change its meaning. 116 Cong.Rec. 37354-37356, 91st Cong. 2d Sess. (November 16, 1970).

enactment of the Indian Major Crimes Act, the Congress expressly relinquished any §1153 jurisdiction and provided that certain states would exercise all of the criminal jurisdiction in Indian country theretofore exercised by the United States.[8]

The Senate Report described the need for general legislation conferring Indian country criminal jurisdiction on the states.

[8] Under P.L. 280, the States did not acquire exclusive criminal jurisdiction. Tribes in 280 states retain and continue to exercise criminal jurisdiction. Rosebud Sioux Tribe v. South Dakota, 709 F.Supp. 1502, 1512 n.19 (D.S.D. 1989), rev'd. on other grnds., 900 F.2d 1164 (8th Cir. 1990); Confederated Tribes of the Colville Indian Reservation v. Beck, No. C-78-76, 6 Ind.L.R. F-8, F-9 (E.D. Wash. 1978); Belgarde v. Morton, No. C74-683S, 2 Ind.L. R. (No. 9) 15, 18 (W.D. Wash. 1975); F. Cohen, Handbook of Federal Indian Law 367 (1982 ed.); 116 Cong.Rec. 37355, 91st Cong. 2d Sess. (November 16, 1970)(reprinting Department of the Interior position).

> The United States district courts have a measure of jurisdiction over offenses committed on Indian reservations or other Indian country by or against Indians, but in cases of offenses committed by Indians against Indians that jurisdiction is limited to the so-called 10 major crimes....
>
> As a practical matter, the enforcement of law and order among the Indians in the Indian country has been left largely to the Indian groups themselves. In many States, tribes are not adequately organized to perform that function; consequently, there has been created a hiatus in law enforcement authority that could best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility.

S.Rep.No. 699, 83d Cong. 1st Sess. (July 29 1953), 1953 U.S.C.C.A.N. 2411-2412. See, Bryan v. Itasca County, 426 U.S. 373, 379 (1976)(the primary concern of P.L. 280 was dealing with the problem of lawlessness and the absence of adequate tri l law enforcement on certain reservations).

From 1940-1953, Congress enacted a total of 6 statutes dealing with the extension of state criminal jurisdiction to Indian

country. Throughout the 14 years that Congress addressed this issue, the federal government's administration of its §1153 jurisdiction was never questioned or found to be inadequate. In fact, the legislative record reveals an intent to avoid interference with federal criminal jurisdiction. Rather, the focus was always on the gap in law enforcement and criminal jurisdiction resulting from the limited scope of §§1152 and 1153. The gap was consistently described. It concerned petty crimes, not defined by federal law, committed by Indians in Indian country, the one area of criminal law enforcement where Indian tribes had exclusive jurisdiction but, in many instances, were not effectively exercising this jurisdiction. In conferring jurisdiction on Kansas, North Dakota, Iowa, New York and other states, Congress emphasized that the conferral did

not mandate states to exercise the jurisdiction conferred. Congress repeatedly stated that its purpose was "to protect the Indians" from non-law abiding tribal members but only in circumstances where tribal law enforcement and criminal jurisdiction were ineffective Since tribes did not have jurisdiction over federal major crimes, it would appear that these acts did not contemplate State jurisdiction over major crimes.[9]

Unlike P.L. 280, the Kansas, North Dakota, Iowa and New York acts preserved federal §1152 and §1153 jurisdiction. This jurisdiction has always been held exclusive. See e.g., United States v. John, 437 U.S. 634, 651, 651-652 n. 22 (1978).

[9] If the conferral of state jurisdiction was intended to deal with a gap left by unsatisfactory federal administration of its §1153 jurisdiction, a conferral of jurisdiction that mandated state criminal law enforcement, as in P.L. 280 states, would have been necessary.

Unlike P.L. 280, nothing in these acts expresses a congressional intent to alter exclusive federal major crimes jurisdiction. The Kansas act, in fact, was amended before enactment to remove language that would have expressly made federal §1153 jurisdiction concurrent with the state criminal jurisdiction conferred. 86 Cong.Rec. 5596, 76th Cong. 3d Sess. (May 6, 1940).

Youngbear v. Brewer advances several additional premises for resolving the ambiguity in the Iowa Act in favor of exclusive federal major crimes jurisdiction. These include the time-honored policy of the United States to "leave Indians free from State jurisdiction." 415 F.Supp.at 811. In accord with this policy, tribal rights "to be tried exclusively in Federal court for alleged violations of the Major Crimes Act

should not be abrogated absent a clear expression from Congress." Id. at 812. The courts below acknowledge that the Kansas Act is ambiguous as to whether exclusive federal major crimes jurisdiction is retained. Absent an unambiguous statement from Congress that exclusive federal Indian major crimes jurisdiction is relinquished, any repeal of such federal jurisdiction would be by implication. See e.g., Menominee Tribe v. United States, 391 U.S. 404, 411 (1968)(Statutes should be construed to avoid repeals by implication); Randall v. Loftsgaarden, 478 U.S. 647, 661 (1986)(same).

Youngbear, id., also stresses the fundamental statutory construction principle that ambiguous statutes "passed for the benefit of dependent Indian tribes...are to be liberally construed, doubtful expressions being resolved in

favor of the Indians." Bryan v. Itasca County, supra, 426 U.S. at 392. This rule "is to be given 'the broadest possible scope.'" Andrus v. Glover Construction Co., 446 U.S. 608, 619 (1980)(citation omitted). The Kansas Act and its progeny were all enacted for the stated benefit of the Indians to provide needed protection against lawlessness described as minor offenses not defined by federal law and not addressed by the exercise of tribal jurisdiction. As Youngbear points out, resolving the ambiguity at issue in favor of concurrent federal/state jurisdiction over major crimes would subject tribal members to the possibility of prosecution by each sovereign "for essentially one offense," 415 F.Supp. at 812, a possibility not endorsed in the language or legislative histories of the Kansas Act or any subsequent related act. Moreover, the

unfortunate fact is that tribal communities continue to have a need to avoid state criminal jurisdiction, especially with respect to major crimes, for the reasons described in United States v. Kagama, 118 U.S. 375, 384 (1886)("Because of the local ill feeling, the people of the states where they [i.e., the Indians] are found are often their deadliest enemies"). The potential for double prosecution for the same criminal act would also single out Indians in this way solely on the basis of race. Non-Indians committing the identical criminal act could only be prosecuted once. Serious fifth amendment due process issues emerge, therefore, if the Kansas Act and its progeny are construed to permit concurrent federal/state major crimes jurisdiction. Clinton, "Criminal Jurisdiction Over Indian Lands: A Journey Through A Jurisdictional Maze," 18

Ariz.L.R. 503, 548-549 n. 223 (1976). The concurrent jurisdiction approach, taken by the courts below, does not resolve the "doubtful expression[]...in favor of the Indians."

A conclusion that the Kansas Act did not intend to eliminate exclusive federal Indian major crimes jurisidiction finds further support in this Court's instruction that "[c]ourts 'are not obliged in ambiguous instances to strain to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach [i.e., promotion of tribal self-government] to what is, after all, an ongoing relationship."' Bryan v. Itasca County, supra, 426 U.S. at 389 n. 14 (citation omitted). From the Kansas Act in 1940 to P.L. 280 in 1953, each of the criminal jurisdiction statutes enacted by

Congress, as their language and legislative histories make clear, were motivated in part by an assimilationist policy. See e.g., S.Rep.No. 1490, 80th Cong. 2d Sess, supra, at 1 on the Iowa Act ("It must be recognized that in most if not all Indian communities, the Indians know what is and should be expected of them as to [State] law observances"); H.Rep.No. 2355, 80th Cong. 2d Sess., supra, at 3-4 on the New York Act ("Since these Indians have made considerable advancement and have a great deal of contact with non-Indians in their daily life outside the reservations, ...they would be benefited by the imposition of State criminal laws which would not conflict with Federal jurisdiction"); S.Rep.No. 1489, 80th Cong. 2d Sess., supra, at 1 on the New York Act ("Although it may be argued that the so-called Indian courts should be continued,

and that Indians should continue to be dealt with in accordance with Indian customs, nevertheless it must be recognized that in most, if not all, Indian communities the Indians know what is and should be expected of them as to law observance. It would seem, therefore, that the time has come for the Indians to be brought into conformity with the penal standards of the communities of which they form a part"). Since about 1960, this assimilationist policy has given way to a federal policy of promoting tribal self-determination and self-government, including the revitalization and strengthening of tribal law enforcement and judicial systems. Amici have been the beneficiaries of this policy as have the Kansas tribes. In view of the admittedly ambiguous language in the Kansas Act and its progeny regarding the continuation of

exclusive federal Indian major crimes jurisdiction, this Court should not strain to implement the assimilationist policy of the Kansas Act.

CONCLUSION

Considering that the Indian Major Crimes Act is a "'carefully limited intrusion of federal power into the otherwise exclusive jurisdiction of the Indian tribes to punish Indians for crimes committed on Indian land,'" United States v. Wheeler, 435 U.S. 313, 325 n. 22 (1978)(citation omitted), the court below has significantly expanded this intrusion by construing the Kansas Act as conferring concurrent jurisdiction on the State over §1153 crimes.

Amici respectfully suggest that the decision of the court of appeals below was wrong and should be reversed.

August 31, 1992.

Respectfully submitted,

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